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November 25, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Daniel Phythyon, Chief
Wireless Telecommunications Bureau
2025 M Street, NW Room 5002
Washington, DC 20554

Re: Federal Preemption of Moratoria Regulation Imposed by State and
Local Governments on Siting of Telecommunications Facilities
DA 96-2140 / FCC 97-264

Procedures for Reviewing Requests for Relief from State and Local
Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications
Act of 1934
WT Docket No. 97-192

Ex Parte Presentation

Dear Mr. Phythyon:

PrimeCo Personal Communications, L.P. ("PrimeCo")¹, hereby submits an
ex parte presentation to supplement the record in the above-referenced proceedings.
Pursuant to Section 1.1206(a)(1) of the Commission's rules, two copies of this presentation
are being provided to the Secretary for inclusion in the public record for both proceedings.

¹ PrimeCo is a limited partnership comprised of PCSCO Partnership (owned by NYNEX PCS, Inc. and Bell Atlantic Personal Communications, Inc. and controlled solely by Bell Atlantic Corp.) and PCS Nucleus, L.P. (owned by AirTouch PCS Holding, Inc. and U S WEST PCS Holdings, Inc.). PrimeCo is the broadband A/B Block PCS licensee or is the general partner/majority owner in the licensee in the following MTAs: Chicago, Milwaukee, Richmond-Norfolk, Dallas-Fort Worth, San Antonio, Houston, New Orleans-Baton Rouge, Jacksonville, Tampa-St. Petersburg-Orlando, Miami and Honolulu.

cc: [unclear] [unclear]

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PrimeCo has been an active participant in these proceedings, and will not repeat arguments made in its earlier filings. Rather, the purpose of this letter is to supplement the records concerning pertinent factual developments occurring after the reply comment filing deadlines.

Specifically, new moratorium regulation by Palm Beach County, Florida (the "County"), a jurisdiction in PrimeCo's Miami-Fort Lauderdale MTA, was formally approved by the County's Board of Commissioners on November 4, 1997. The County had previously adopted a 6-month moratorium which was scheduled to expire November 20, 1997, but has now decided to extend the moratorium an additional 60 days to January 18, 1998.²

The County's recent actions demonstrate that siting moratoria are by no means a moot issue for CMRS providers. Indeed, PrimeCo's experience in the County underscores how moratoria continue to be used to regulate and prohibit CMRS deployment. The moratorium also emphasizes the need for the Commission to expeditiously adopt procedures for the preemption of RF-based local facilities siting regulation.

The ability to deploy facilities within the County is critical to PrimeCo's service in the Miami-Fort Lauderdale MTA. Major North-South transportation corridors, including Interstate 95 and the Florida Turnpike, pass through the County, and many of the County's nearly one million residents commute to nearby Dade and Broward counties for work. Business travelers and tourists also pass through the County. The County's moratorium, and the additional delay imposed as a result of the 60-day extension, have directly affected approximately 10 facilities sites and have effectively prohibited PrimeCo from expanding its coverage area to meet its customers' demand. In fact, certain PrimeCo customers (now *former* customers) in the Miami-Fort Lauderdale MTA have returned handsets due to the coverage gaps resulting from PrimeCo's inability to construct sites and provide service in the County in response to customers' service requirements.³ PrimeCo submits that while certain commenting parties have discounted the impact of moratoria on service provision, PrimeCo's experience demonstrates the patent inaccuracy of these comments.⁴

² Ordinance No. 97-42 at 2, lines 23-37 (copy attached).

³ See Attached Statement of Mark Ciarfella, Governmental Affairs Manager for PrimeCo Personal Communications, L.P., for the Miami-Fort Lauderdale Major Trading Area.

⁴ See, e.g., the following comments in DA 96-2140/FCC 97-264: American Planning
(continued...)

In addition, PrimeCo notes that the County's moratorium, and its recent extension, have been motivated in part by controversy over the environmental effects of *RF emissions* — notwithstanding the Commission's exclusive authority in this area. Thus, the extension was adopted in part because the County has "directed staff to continue *research on tower siting policy relating to [the] monitoring of radio frequency emissions.*"⁵ Furthermore, and as reported in the press, the original moratorium was adopted in part in response to the RF emission concerns expressed by the group "Families Against Cellular Towers at Schools."⁶ The County's original moratorium was adopted *after* the local RF emission controversy arose, effectively scuttling months of negotiations between the industry, local government officials and citizen representatives.

The County also attempts to justify the moratorium extension in part because "[County] review of the Federal Communication Commission rules . . . is [purportedly] consistent with the [1996 Act]."⁷ The only "rules" the Commission has adopted relating to the 1996 Act's facilities siting provisions are those implementing the RF emission provisions of Sections 704.⁸ It thus appears that a proffered reason given for

⁴ (...continued)

Ass'n Comments at 2; Concerned Communities Reply Comments at 4-5; Nat'l League of Cities *et al.* Reply Comments at 6-8.

⁵ Ordinance No. 97-42 at 2, lines 27-31 (emphasis added). *See* Letter from Michele Farquhar, Chief, Wireless Telecom. Bur., to Thomas E. Wheeler, CEO, Cellular Telecommunications Ind. Ass'n, Jan. 13, 1997, at 2 (states may not regulate facilities siting based on results of state's RF emission study).

⁶ *See* "County Bans New Cell Towers for 6 Months," *Fort Lauderdale Sun-Sentinel*, May 21, 1997, at 1B (moratorium "urged by several residents who live near proposed towers and fear damage to their health and property values"); "Tower Fight: Citizens Leave Cell Industry in the Dust," *Fort Lauderdale Sun-Sentinel*, April 20, 1997, at 1B (adoption of moratorium "a lobbying triumph" for founders of anti-tower group). In addition, a moratorium imposed by the Palm Beach County School Board was imposed in direct response to this group's concern for RF emissions. *See* "Cell Moratorium Extended," *Fort Lauderdale Sun-Sentinel*, September 4, 1997, at 1B; "Florida group requests towers far from schools," *RCR*, April 7, 1997, at 70.

⁷ Ordinance No. 97-42 at 2, lines 19-22.

⁸ *See* Telecommunications Act of 1996, Pub. L. 104-104, §§ 704(a) (codified at 47 U.S.C. § 332(c)(7)(B)(iv)), 704(b); 47 C.F.R. § 1.1307(e); *Guidelines for Evaluating the*
(continued...)

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the County's proposed 60-day moratorium extension is the pendency of the Commission's *Notice of Proposed Rulemaking* in WT Docket No. 97-192 ("*RF Emissions Proceeding*"). As the Communications Act makes clear, however, so long as PrimeCo's facilities comply with the Commission's RF Emission rules, the County is precluded from imposing its own RF regulations.⁹

The Palm Beach County moratorium has had a negative impact on PrimeCo's operations in Southern Florida. Further, as long as the County is able to arbitrarily extend its moratorium without Commission intervention, PrimeCo cannot give current/prospective South Florida customers a good faith estimate of when service coverage gaps will be remedied. In addition, when the moratorium is finally lifted, additional time will be required to obtain formal zoning approval for sites in the County and to construct and test facilities. The negative impact on service provision and competition should not be ignored.

The County's moratorium regulation exemplifies the arbitrary, purposeless and burdensome local entry barriers that Congress intended to preempt when it enacted Sections 253 and 332(c)(3). The moratorium also contravenes Congress' express prohibition on local RF emission regulation set forth in Section 332(c)(7). For these reasons and those discussed in its earlier filings, PrimeCo's experience with the County

⁸ (...continued)

Environmental Effects of Radiofrequency Radiation, Report and Order, 11 FCC Rcd. 15123, 15125 n.4 (1996).


⁹ 47 U.S.C. § 332(c)(7)(B)(iv); *see also* Correspondence from Michele Farquhar, Chief, Wireless Telecom. Bur., to the Honorable Richard Hurt, Mayor, City of Bedford, TX, dated June 14, 1996, at 2 ("[T]he pendency of [the RF] proceeding does not affect the rules which currently govern the environmental effects of rf emissions."); Correspondence from Reed Hundt, Chairman, Federal Communications Commission, to the Hon. Susan Golding, Mayor, City of San Diego, dated March 15, 1996; Wireless Telecommunications Bureau, *National Wireless Facilities Siting Policies, Fact Sheet #2*, released Sept. 17, 1996, at 12.

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underscores the need for the Commission to (1) expeditiously preempt moratoria as proposed in its July 28, 1997 Public Notice; and (2) to expeditiously adopt procedures to consider requests for preemption of local RF emission regulation.

Sincerely,

PRIMECO PERSONAL COMMUNICATIONS, L.P.


William L. Roughton, Jr.
Associate General Counsel

cc: Magalie Roman Salas, Secretary (2)
Shaun Maher, Wireless Telecom. Bur.
Randall Coleman, CTIA
Robert P. Banks, Esq., Asst. County Atty.

**DECLARATION OF
MARK CIARFELLA**


I, Mark Ciarfella, state as follows:

1. I am Governmental Affairs Manager for PrimeCo Personal Communications, L.P. ("PrimeCo") for the Miami-Fort Lauderdale Major Trading Area ("MTA"), which includes all of Palm Beach County, Florida. As Governmental Affairs Manager for PrimeCo, my responsibility is to ensure PrimeCo's telecommunication facilities are permitted through the proper jurisdictional agency. In addition, my responsibilities include monitoring and participating in the drafting of new regulations for the placement of wireless telecommunication facilities.

2. Through my current position, I am knowledgeable about matters relating to PrimeCo's operations, system deployment and marketing activities in the Miami-Fort Lauderdale MTA.

3. I have reviewed the foregoing *ex parte* letter filing and have personal knowledge of the facts contained therein as they relate to PrimeCo's operations, system deployment and marketing activities in the Miami-Fort Lauderdale MTA, including the detrimental impact of the Palm Beach County Moratorium on system deployment and service provision, and PrimeCo's loss of subscribers due to coverage gaps.

4. I hereby state that the facts contained in the foregoing *ex parte* letter filing and in the instant declaration are true to the best of my knowledge, information and belief.



Mark Ciarfella
Governmental Affairs Manager

Dated: *Nov. 25, 1997*

ORDINANCE NO. 97-42

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, FLORIDA, AMENDING THE UNIFIED LAND DEVELOPMENT CODE OF PALM BEACH COUNTY, FLORIDA, ORDINANCE 92-20, AS AMENDED, AS FOLLOWS: AMENDING SEC. 6.4.D.22. OF THE UNIFIED LAND DEVELOPMENT CODE; EXTENDING THE EXISTING ONE HUNDRED AND EIGHTY (180) DAY MORATORIUM ON THE ACCEPTANCE OF APPLICATIONS FOR DEVELOPMENT PERMITS FOR COMMERCIAL COMMUNICATION TOWERS AND TOWER FACILITIES BY SIXTY (60) DAYS; PROVIDING FOR THE TREATMENT OF PENDING APPLICATIONS AND PREVIOUSLY APPROVED COMMERCIAL COMMUNICATION TOWERS AND TOWER FACILITIES; PROVIDING FOR EXCLUSIONS; PROVIDING FOR INTERPRETATION OF CAPTIONS; PROVIDING FOR REPEAL OF LAWS IN CONFLICT; PROVIDING FOR SEVERABILITY; PROVIDING FOR INCLUSION IN THE UNIFIED LAND DEVELOPMENT CODE; AND PROVIDING FOR AN EFFECTIVE DATE.

19 WHEREAS, the Telecommunications Act of 1996, hereinafter referred to as the
"Act", was signed into law on February 8, 1996; and

20 WHEREAS, the Act preserves the authority of local governments to make
21 decisions regarding the placement, construction and modification of commercial
22 communication towers and facilities as long as those decisions do not unreasonably
23 discriminate among providers of functionally equivalent services or prohibit or have the
24 effect of prohibiting the provision of personal wireless services; and

25 WHEREAS, passage of the Act, changes in wireless communication technology,
26 additional licenses granted by the Federal Communications Commission and the
27 increased consumer demand for personal wireless services has had the effect of
28 creating a climate of heightened competition among the providers of personal wireless
29 services and numerous providers of personal wireless services have expressed the
30 desire to locate personal wireless communications facilities within the County; and

31 WHEREAS, this increased competition has resulted in an increase in the
32 number of applications for approval of commercial communication towers and facilities
33 in the County; and

34 WHEREAS, the Act further provides that a state or local government shall act on
35 any request for authorization to place, construct, or modify commercial communication
36 towers and facilities within a reasonable period of time after the request is filed with that
37 government; and

38 WHEREAS, the number of potential sites within the County which would be
39 acceptable for the installation of commercial communication towers and facilities is
40 limited; and

41 WHEREAS, the Board of County Commissioners has determined that the current
42 provisions within Unified Land Development Code (ULDC) of Palm Beach County
43 relating to the regulation of the placement and construction of commercial
44 communication towers and facilities are inadequate as they relate to compatibility with
45 surrounding properties, proliferation of towers and ensuring that co-location of
46 antennas is required; and

Underlined language indicates language proposed to be added.

~~Language struck-out~~ indicates language proposed to be deleted.

... (ellipses) indicates language not amended which has been omitted to save space.

1 WHEREAS, the County requires time to study the adequacy of its current
2 regulatory ordinances and to explore and develop modifications or additions to those
3 ordinances, and

4
5 WHEREAS, the Board of County Commissioners has directed staff to draft any
6 needed amendments to the ULDC determined to be required to protect the aesthetic,
7 health, safety and welfare concerns found to exist; and

8 WHEREAS, County staff has begun the process of researching and drafting any
9 such amendments to the ULDC of Palm Beach County; and

10 WHEREAS, the Board of County Commissioners has directed staff to participate
11 in an intergovernmental task force related to the placement of commercial
12 communication towers and facilities throughout the entire County; and

13 WHEREAS, the Board of County Commissioners is desirous of protecting
14 residential areas from a proliferation of cellular towers while the new regulations are
15 being drafted; and

16 WHEREAS, the Board of County Commissioners has provided for the continued
17 siting of certain commercial communication towers and facilities to ensure the health,
18 safety and welfare of the citizens; and

19 WHEREAS, the moratorium, together with the continued study, including the
20 review of the Federal Communication Commission rules, and investigation relating to
21 the placement of commercial communication towers and facilities, is consistent with the
22 Act; and

23 WHEREAS, the Board of County Commissioners at the April 15, 1997 public
24 hearing declared its intent to impose a 180 calendar day moratorium, beginning on the
25 effective date of this ordinance, relating to all applications for the approval of
26 development permits for commercial communication towers and facilities; and

27 WHEREAS, the Board of County Commissioners directed staff to continue
28 research on tower siting policy related to: monitoring of radio frequency emissions;
29 increased setbacks from residential areas; installation of towers in residential areas;
30 and, allowing television towers to be replaced due to public right-of-way acquisition;
31 and,

32 WHEREAS, an extension of the existing moratorium would provide sufficient
33 time to present additional information and suggest alternatives; and,

34 WHEREAS, the Board of County Commissioners at the September 25, 1997
35 public hearing declared its intent to extend the 180 calendar day moratorium by 60
36 days, to January 18, 1998, relating to all applications for the approval of development
37 permits for commercial communication towers and facilities.

38 NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY
39 COMMISSIONERS OF PALM BEACH COUNTY, FLORIDA, THAT:

40 Part 1. Section 6.4.D.22 is hereby amended to add the following language:

41 Section 6.4.D.22. Communication tower, commercial. AM/FM radio, television,
42 microwave and cellular telephone transmission towers, antennas and accessory

Underlined language indicates language proposed to be added.

Language within brackets indicates language proposed to be deleted.

--- (ellipses) indicates language not amended which has been omitted to save space.

equipment and buildings. A commercial communication tower use shall comply with the following supplementary use standards: If this section prohibits a government owned tower from being located at a specific site and the tower is required to protect the public welfare or safety, the applicable criteria of this section may be waived or modified by the BCC. In such cases the BCC shall make a finding of fact indicating the justification for the modification.

Moratorium

(A) That the Board of County Commissioners of Palm Beach County does hereby ~~impose~~ extend the existing one hundred eighty (180) day moratorium beginning ~~on the effective date of this ordinance~~, which began on May 23, 1987, upon the acceptance of all applications for development permits for the approval of commercial communication towers or facilities by sixty (60) days to January 18, 1998.

If amendments to Section 6.4.D.22 of the ULDC of Palm Beach County are adopted prior to the final date of the ~~extended~~ moratorium, such ordinance shall include a provision repealing this moratorium ordinance.

(B) That this ordinance shall not apply to any legally sufficient application for development permits submitted prior to the effective date of this ordinance, pursuant to Section 6.4.D.22 of the ULDC of Palm Beach County, or the items indicated below in Subpart C.

(C) This ordinance specifically excludes and shall not affect (1) building or roof mounted antennas; (2) camouflage structures; (3) stealth structures; (4) relocation of towers or facilities due to public right-of-way acquisition; ~~(5) new towers for television antennas which are constructed due to the acquisition of public right-of-way affecting an existing television tower.~~ (5)(5) tower replacement with structures of the same type and height; (6)(7) pole attachments or the placement of antennas, where such attachment or placement does not involve the construction, structural modification or expansion of a tower structure; or (7)(8) publicly owned towers or facilities required to ensure the public safety of the citizens; and (8)(9) the construction of a new tower when the structure will be located at least 2,500 feet from the property line of an existing residential structure. Proposed tower locations consistent with the requirements of this subsection may submit an application for development permit approval subject to the current requirements of the ULDC.

...

PART 2. CAPTIONS:

The captions, section headings, and section designations used in this ordinance are intended for the convenience of users only and shall have no effect in the interpretation of the provisions of this ordinance.

PART 3. REPEAL OF LAWS IN CONFLICT:

All local laws and ordinances applying to the unincorporated area of Palm Beach County in conflict with any provision of this ordinance are hereby repealed to the extent of any conflict.

PART 4. SEVERABILITY:

1 If any section, paragraph, sentence, clause, phrase, or word of this ordinance is for any
2 reason held by the Court to be unconstitutional, inoperative or void, such holding shall
3 not affect the remainder of this ordinance.

4 **PART 5. INCLUSION IN THE UNIFIED LAND DEVELOPMENT CODE:**

5 The provision of this ordinance shall become and be made a part of the Unified Land
6 Development Code of Palm Beach County, Florida. The Sections of the ordinance may
7 be renumbered or relettered to accomplish such, and the word "ordinance" may be
8 changed to "section," "article," or any other appropriate word.

9 **PART 6. EFFECTIVE DATE:**

10 The provisions of this ordinance shall become effective upon filing with the Department
11 of State.

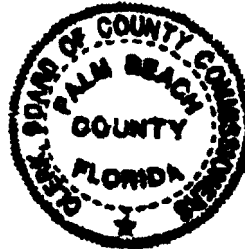
12 **APPROVED AND ADOPTED** by the Board of County Commissioners of Palm Beach
13 County, on the 4th day of November, 1997.

14 **ATTEST: PALM BEACH COUNTY, FLORIDA**
15 **BY ITS BOARD OF COUNTY COMMISSIONERS**
16 **DOROTHY H. WILKEN**

17 By: Carla Zapra [Signature]
18 Deputy Clerk Chairman

19 **APPROVED AS TO FORM AND**
20 **LEGAL SUFFICIENCY**

21 By: [Signature]
22 County Attorney



23 **EFFECTIVE DATE:** Filed with the Department of State on the 10th day of
24 November, 1997, at _____ m.

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